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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL J. OLIVIERI, *et al.*

Cross-Petitioners,

—against—

BENJAMIN WARD, in his official capacity as Police Commissioner of the City of New York, EDWARD I. KOCH, in his official capacity as Mayor of the City of New York, and THE NEW YORK CITY POLICE DEPARTMENT,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 12, 1987

QUESTIONS PRESENTED FOR REVIEW

1. In the absence of erroneous findings of fact or conclusions of law, may a court of appeals substitute its own remedy for that fashioned by the district court in response to a proven constitutional violation?

(a) In crafting a remedy for violation of the free speech rights of Cross-Petitioners (gay Roman Catholics), can the district court be found to have abused its discretion by not also crafting a remedy for anti-gay groups who were not parties to the action and who did not seek to intervene?

(b) Even if the district court was obligated to consider providing a remedy for non-party anti-gay groups, was it the proper role of the court of appeals to substitute

its own remedy sua sponte, and thereby curtail Cross-Petitioners' relief, or should it have remanded the matter to the district court?

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PARTIES TO THE PROCEEDING

Cross-Petitioners */

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Richard Ferrara
Edmund W. Trust
Hugh R. Bruce
John D. Edwards
Joseph Brown
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Christopher Wesolowski
Gary W. Spokes

and

Dignity—New York, a not-for-profit corporation organized under the laws of the State of New York.

Cross-Respondents

Benjamin Ward
Edward I. Koch
The New York City Police Department.

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*/ Tom Kohler, who was originally an individual plaintiff in the district court, has since died.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

Cross-Petitioners Michael Olivieri, et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit entered in this matter on September 16, 1986.

Pursuant to Rules 19.5 and 20.5 of the Rules of this Court, Cross-Petitioners seek review of the judgment below only in the event that the Court is disposed to grant the Petition for Certiorari served by Cross-Respondents Benjamin Ward, et al. in this matter on December 12, 1986 and docketed at No. 86-989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 801 F.2d 602 and is reprinted beginning at page 1 of the Appendix accompanying the Petition for Certiorari in No. 86-989 (hereafter "the Appendix"). 1/ The interim order of the

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1/ Citations to the Appendix are in the

court of appeals is reprinted beginning at page 27 of the Appendix.

The opinion of the United States District Court for the Southern District of New York, comprising its Findings of Fact and Conclusions of Law, is reported at 637 F. Supp. 851 and is reprinted beginning at page 35 of the Appendix.

The prior opinion of the court of appeals on the application for preliminary injunction in this matter is reported at 766 F.2d 690 and is reprinted beginning at page 163 of the Appendix. The prior opinion of the district court on the application for preliminary injunction is reported at 613 F. Supp. 616 and is reprinted beginning at page 202 of the Appendix.

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form "A__".

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1986. The Petition for Certiorari in No. 86-989 was received by Cross-Petitioners on December 12, 1986. Pursuant to Rule 19.5 of the Rules of this Court, this Cross-Petition has been filed and served within 30 days of receipt of the Petition for Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. III, § 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...."

U.S. Const., amend. 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances."

U.S. Const., amend. 14:

"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The underlying facts of this case are recited at length in the Petition for Certiorari and the Brief in Opposition in No. 86-989, and will not be unnecessarily repeated here. For purposes of this Cross-Petition, it is sufficient to note the following.

This action was brought in the first instance in the district court by Dignity—New York and several of its individual members (hereafter referred to collectively as "Dignity") pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(a)(3)&(4), alleging violation of their constitutional rights. Defendants Benjamin Ward, Edward I. Koch, and the New York City Police Department (hereafter referred to collectively as "the Police Department"), after years of permitting Dignity members to conduct a prayer service on the steps

and publicly owned sidewalk in front of St. Patrick's Cathedral in New York City during the annual Gay Pride Parade, in 1983 and subsequent years denied Dignity access to both areas. (A51-52) The purported justification for this action was the alleged danger of violence stemming from anti-gay individuals and groups opposed to the Gay Pride Parade in general and Dignity's presence on the Cathedral's steps or even the public sidewalk in front of the Cathedral ("the Sidewalk"). (A52, A58, A84)

Dignity claimed, among other things, that the action of the Police Department was an unconstitutional infringement of its rights to freedom of expression. After an eight day trial on the merits, the district court declared that the restriction imposed by the Police Department violated First Amendment guarantees. It found that (1) the restriction imposed

amounted to a "content-sensitive" heckler's veto (A144), (2) the Police Department's action was the result of excessive sympathy with the Catholic Church (A136, A151-52), and (3) even if not content based, the restriction was not narrowly tailored to further a significant state interest (A152-59).

The declaration of unconstitutionality entered by the district court was affirmed by the court of appeals. (A?6) The merits of the finding of unconstitutionality are discussed at length in the submissions connected with the Petition for Certiorari in No. 86-989, and are not the subject of this Cross-Petition.

Pursuant to the declaration of unconstitutionality, the district court then proceeded to craft an appropriate remedy. The question of the proper remedy had already been the subject of

several discussions between the district court and the parties. During the hearings on the motion for preliminary injunction in 1985, the district court, after it decided that relief was warranted, ordered the Police Department to submit a plan that would allow Dignity its symbolic expression. 2/ (A76) The Police Department, however, refused to submit such a proposal as ordered by the Court. (A77) Nevertheless, as discovery later revealed, the Department in fact had devised an internal plan in response to the district court's preliminary injunction, by which up to 100 members of Dignity would be permitted on a portion of the Sidewalk, enclosed in a pen

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2/ By allowing the Police Department to make the initial proposal, the district court also permitted the Police Department to incorporate provisions it thought necessary to protect public safety.

enclosed by barricades, and protected by an ample number of police officers. (A77, A129) This plan, however, was never used, since the court of appeals subsequently vacated the preliminary injunction before the 1985 Parade was held. (A163-81)

When, after a complete trial on the merits, the district court granted permanent injunctive relief, the question of the appropriate remedy was again presented. By this time, however, the district court was aware of the plan devised by the Police Department the year before. (A130-31) In fashioning its remedy, the district court in essence adopted that plan, ordering that up to 100 members of Dignity be allowed on the Sidewalk in front of the Cathedral during

the Parade. 3/ The district court also provided that the Police Department could apply in future years for modification of the injunction should circumstances change. (A34)

The Police Department appealed. Because there was insufficient time for the court of appeals to "adequately resolve the significant issues raised by the appeal with an appropriate opinion in the brief interval that remain[ed]" before the 1986 Parade, the court issued

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3/ "The police plan formulated in response to this court's order last May 1985, that would have provided for the placement of fifty to a hundred Dignity members in a demonstration pen on the Cathedral sidewalk, is a more precise example of what the court has in mind. The court is confident that such a plan will adequately guarantee the government interest in peace, for it does not credit police department assertions that the police created an inadequate plan in response to the court's 1985 order." (A158-59)

an interim order on its own motion, allowing 25 members of Dignity and 25 members of the anti-gay groups each to demonstrate for 30 minutes, separated by a gap of 30 minutes. This was the plan that was actually put into effect at the 1986 Parade.

Three months after the Parade, the Second Circuit issued its opinion on the merits. Although agreeing that a constitutional violation had occurred, it disagreed with the relief fashioned by the district court. In the court of appeals' opinion, the district court had erred in failing to consider the speech rights of the anti-gay groups who would be present in the area. (A18-19, A21-22) The court of appeals thereupon decided to craft its own remedy sua sponte. (A22-25)

The court of appeals thought it "preferable" that the interim order it

put into effect for the 1986 Parade become permanent, i.e., that each group (Dignity and the anti-gay groups) have an equal time of thirty minutes on the Sidewalk during the two hour march, and also be limited to twenty-five demonstrators each. (A22) The Second Circuit was of the opinion that its solution met the tests of a content neutral regulation, narrowly tailored to address the Police Department's interest in public safety. (A23)

REASONS FOR GRANTING THE WRIT

Summary of Argument

This Cross-Petition raises significant questions concerning the proper allocation of functions between the district courts and the courts of appeals. Once a constitutional violation has been established, fashioning the appropriate remedy is committed to the broad discretion of the district court.

The court of appeals' review of the district court's remedy permitting 100 members of Dignity to stand on the Sidewalk in front of the Cathedral during the Parade should have been limited to the narrow question of whether the district court abused its discretion.

However, rather than addressing this narrow inquiry, the court of appeals simply substituted what it thought was a better solution. That court's modification of the district court's order exceeds the scope of permissible appellate review of a lower court by requiring adjudication of the rights of the anti-gay groups—which despite ample notice never intervened as a party to this litigation.

Furthermore, this Cross-Petition raises questions concerning the jurisdiction of the court of appeals to reach questions not before it. The district

court acted with appropriate judicial restraint and well within its discretion in fashioning an order that addressed the rights of the parties before it. The court of appeals was incorrect in demanding that the district court craft its remedy with sufficient breadth to encompass the potential interests of a non-party. The result of that modification was the inappropriate curtailment of the relief awarded to Dignity by the district court.

Moreover, even if the court of appeals was correct in believing that the district court should have reviewed the rights of a non-party, the court of appeals should have remanded the case to the district court in the first instance to allow the fact finder to refashion a suitable remedy in light of its first hand knowledge of the record.

I. In the Absence of an Error of Fact or Law by the District Court, the Court of Appeals Exceeded the Proper Scope of Review in Modifying the Relief.

It is axiomatic that, once a constitutional violation has been established, the district court has broad discretion in fashioning an appropriate remedy. E.g., Chicago Teachers Union, Local No. 1 v. Hudson, 106 S. Ct. 1066, 1077 n.22 (1986); Milliken v. Bradley, 433 U.S. 267, 280-88 (1977); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). A court of appeals is required to affirm the district court's remedy unless the appellate court finds that the district court abused its discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975).

Here, the remedy adopted by the district court was well within its discretion. The district court was faced

with a wide range of options, including possibly ordering a return to the status quo ante that existed prior to 1983, when the Sidewalk was completely open to the public and no significant violence occurred. 4/ Out of those options, the district court chose a plan devised by the Police Department itself, which allowed 100 members of Dignity on the Sidewalk within an enclosed barricade, 5/

4/ The only incidents of physical confrontation that ever occurred at the Parade--the incidents involving Messrs. McKay and McCauley in 1981--took place when the Police Department did not anticipate any potential disturbances and thus made no special plans to protect safety around the Cathedral. In 1982, forewarned by the incidents of the prior year, the Department enhanced police coverage of the Cathedral, and the Parade occurred peacefully.

5/ The court of appeals was apparently under the misperception that the district court order required the Police to allow Dignity members to roam unencumbered throughout the entire expanse of the Sidewalk. (A21, A23) It was clearly the intent of the district court, however,

but otherwise permitted the Police to protect public safety by "freezing" the Sidewalk to others. This remedy certainly cannot amount to an abuse of discretion. Indeed, unlike the district court's order, which was modeled precisely after the Police Department's own plan, the relief ordered by the court of appeals (25 demonstrators for each group for 30 minutes) was simply a result of the court of appeals' own creativity.

If the court of appeals had merely ordered enhanced access to the Sidewalk for the anti-gay groups (and assuming that the court of appeals had the jurisdiction to do so (but see infra Part II)), Dignity would not have brought this

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that Dignity would be limited to an enclosed barricade, pursuant to the Police Department's own plan (A158-59), and Dignity had always agreed to this limitation.

Cross-Petition, since no matter how serendipitous such a modification might have been, Dignity's relief would not have been affected. Here, however, the court of appeals curtailed Dignity's relief precisely in order to accomplish its goal. This restriction was simply unwarranted.

In determining whether the court has abused its discretion, the court of appeals may review the district court's findings of fact to determine if they are clearly erroneous, or it may review its conclusions of law to see if they are correct. In the instant case, the Second Circuit found no error of fact. 6/ It is

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6/ Indeed, the court agreed with the ultimate conclusion that "the restrictions imposed were not drawn solely to further the government's conceded interest in public safety" (A17), and thus affirmed the declaration of unconstitutionality.

unclear whether the court of appeals thought some error of law had been committed in fashioning the relief; 7/ the gist of that part of the opinion modifying the remedy was that the appellate court thought it "preferable" to impose its own solution. This presents a situation similar to that addressed by this Court in Dayton Board of Education v. Brinkman, 433 U.S. 406, 417-18 (1977), in which it observed:

> "On appeal, the task of a court of appeals is defined with relative clarity . . . . If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, the Court of Appeals

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7/ Presumably, the court of appeals considered the failure to consider the rights of the anti-gay groups to be legal error. If it did, as we demonstrate in Part II, this did not constitute an erroneous legal conclusion.

> did neither. It was vaguely dissatisfied with the limited character of the remedy which the district court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the district court's findings of fact or reversing its conclusions of law."

This case thus presents the question of "the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system". Id. at 409. The fact that the court of appeals might have "preferred" its own solution is beside the point; the primary role in fashioning relief belongs to the district court. See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). "The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case." Dayton, 433 U.S. at 410. It is especially important in a case such as this where the district court is not

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simply asked to render monetary judgment, but rather must craft equitable relief. Id.

II. The Rights of the Anti-Gay Groups Were Not at Issue in this Case.

The court of appeals stated only one reason to modify the district court's remedy: the lower court's alleged failure to consider the constitutional rights of the non-party anti-gay groups. At the outset, it should be noted that Dignity in no way quarrels with the concept that the anti-gay groups are equally entitled to First Amendment rights. However, as in all constitutional adjudication, the proper role of the judiciary is to address itself only to the questions presented, and not to reach unnecessarily to resolve inchoate controversies.

Here, the anti-gay groups were not parties to this action, nor did they ever

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seek to intervene or otherwise seek relief for themselves, despite ample advance knowledge that the litigation was proceeding. 8/ Since they never sought to assert their First Amendment rights, the district court was not obligated to provide a remedy for which they did not ask. Indeed, it would be beyond the jurisdiction of the court to do so. As this Court noted in Williams v. Zbaraz, 448 U.S. 358, 367 (1980), where none of the parties ever raised a constitutional challenge, "the court acted in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution". 9/ Neither Dignity nor the Police

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8/ Indeed, the leaders of the anti-gay groups were deposed during discovery, and testified at length at trial.

9/ Zbaraz involved a similar procedural scenario to that present here. There,

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Department—the actual parties in the proceeding—had standing to assert the rights of the absent anti-gay groups. See Griswold v. Connecticut, 381 U.S. 479 (1965). As this Court has noted:

> "This obligation to notice defects in a court of appeals' subject matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts." 10/

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the court of appeals ordered the district court to pass upon the constitutionality of the Hyde Amendment, even though the issue was never raised. The Court stated:

> "The constitutional validity of the Hyde Amendment was interjected as an issue in these cases only by the erroneous mandate of the Court of Appeals. But, even though the district court was simply following that mandate, the directive of the Court of Appeals could not create a case or controversy where none otherwise existed." 448 U.S. at 367.

10/ This Court has admonished that

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Bender v. Williamsport Area School District, 106 S. Ct. 1326, 1331 (1986) (finding court of appeals without jurisdiction to pass on constitutional questions that appellant had no standing to raise). The district court can hardly be said to have abused its discretion by crafting a remedy that does not address the possible interests of persons not before the court. 11/

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proper resolution of constitutional issues requires full development of the underlying factual issues. City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2038 (1986).

11/ Even if there were a sufficient case or controversy under Article III to adjudicate the anti-gay groups' speech rights, prudential considerations dictate that the court of appeals should not have reached out for this issue. While it is undisputed that the anti-gay groups have commensurate First Amendment rights in the abstract, how those rights would have translated into concrete relief is a question that was never directly posed to the district court. Without a concrete controversy, the occasion to decide precisely what relief, if any, might

III. Even if the District Court Was Required to Consider the Anti-Gay Groups' Rights in Crafting Relief, the Matter Should Have Been Remanded to the District Court for that Purpose.

Even if the court of appeals was correct in deciding that the district court should have weighed the abstract rights of non-parties, 12/ and furthermore should have crafted a remedy for

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have been appropriate for the anti-gay groups was merely an inchoate consideration, and there was no "concrete factual context conducive to a realistic appreciation of the consequences of judicial action". Bender, 106 S. Ct. at 1332 (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

12/ It should be noted that the district court's order in no way abridged the anti-gay groups' speech rights, any more than it affected the rights of anyone else who was not a party. It simply ordered protection of Dignity's rights, and did not address the rights of others, either positively or negatively.

those non-parties as well as for the plaintiffs, it was improper for an appellate court to substitute its own relief sua sponte. Rather, the question of the appropriate remedy should have been remanded to the district court for reconsideration in light of that instruction.

Fashioning an appropriate remedy is a task inextricably tied to the factual record developed in a case. See Dayton, 433 U.S. at 419-20. Of course, the district court is assumed to have a more immediate knowledge of the record, both regarding what it does contain and what it does not contain. See generally, Anderson v. City of Bessemer City, 470 U.S. 564 (1985). Even if a remedy for the anti-gay groups were required, the exact contours of that remedy depend on several factual considerations, including the possibility that they might

themselves incite violence. Since development of the record never focused directly on these issues, the district court might have thought it wise to take additional evidence before deciding on a remedy. 13/

On the other hand, the possible potential for violence stemming from Dignity's presence on the Sidewalk was an issue exhaustively explored at trial, culminating in the conclusion that there was none. (A47, A135-36, A153) In light of that record, the district court might well have concluded that further restrictions on Dignity's expression, such as those imposed by the court of appeals,

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13/ Furthermore, prudence also dictates that the Police Department at least be given the opportunity to present its own proposal for a feasible plan, so that the courts may have the benefit of its insight as to precautions that might be taken.

were simply unnecessary to accommodate the anti-gay groups. At any rate, the district court should have been permitted the chance to make that determination in the first instance. Dayton, 433 U.S. at 419; Lemon, 411 U.S. at 200.

CONCLUSION

Although Dignity disagrees with the court of appeals' modification of the remedy, it is equally important to stress what issues the court of appeals' modification does not implicate. The Police Department, in its Petition for Certiorari in No. 86-989, argues that the Second Circuit's "fine tuning" is empirical evidence of the inappropriateness of the federal judiciary intervening at all in police regulations. (Petition for Certiorari at 30-31) However, the propriety of the Second Circuit's modification has no bearing on the power and duty of the federal judiciary to fashion

remedies. "There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations . . . are proved". Dayton, 433 U.S. at 410 (school busing desegregation plan). To the extent that there was error on the part of the court of appeals, it was not that the federal judiciary cannot and should not craft relief, but that it misperceived its own role as an appellate court in that process.

In the larger context of this case, Dignity's disagreement with the court of appeals is admittedly narrow, and Cross-Petitioners are not unmindful of the fact that the Second Circuit affirmed the central holdings that a constitutional violation had occurred, and that injunctive relief was warranted. Nevertheless, the "proper allocation of functions between the district courts and

the court of appeals within the federal judicial system" (Dayton, 433 U.S. at 409), suggests that the court of appeals exceeded its proper role in modifying the relief ordered by the district court. It furthermore reached out to decide a question over which there was no justiciable controversy. Therefore, in the event that the Court grants the Petition for Certiorari in No. 86-989, Dignity respectfully urges that the Court grant this Cross-Petition for Certiorari.

Dated: January 12, 1987

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